

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
MICHAEL RAVNITZKY)	FOIA Control No. 2008-133
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2009**Released: October 1, 2009**

By the Commission:

1. By this memorandum opinion and order, we deny an application for review by Michael Ravnitzky (Ravnitzky),¹ appealing the partial denial by the Consumer and Governmental Affairs Bureau (CGB)² of Ravnitzky's Freedom of Information Act (FOIA) request.³ Ravnitzky's FOIA request sought records relating to an earlier FOIA request submitted by an individual named Emil Steiner (FOIA Control No. 2008-035).⁴ Ravnitzky sought copies of (1) Steiner's FOIA request, (2) CGB's response to Steiner, (3) the records provided to Steiner, and (4) the contents of the relevant administrative tracking folder, including e-mail.⁵ CGB disclosed to Ravnitzky copies of the first three items that Ravnitzky requested but withheld the contents of the administrative tracking file under FOIA Exemption 5.⁶ The tracking file contains Commission staff e-mails discussing how to respond to the Steiner FOIA request.

2. In his AFR, Ravnitzky asserts that CGB did not properly apply Exemption 5. Ravnitzky argues that CGB's Response gives no indication that CGB individually reviewed each document in the administrative tracking file to determine which portions should be withheld as deliberative and predecisional and which should be disclosed as factual. He states that "[i]t strains the bounds of credulity to imagine that not one line of one page was releasable."⁷ He claims that "the withheld records contained a great deal of factual portions and those portions

¹ Letter from Michael Ravnitzky to Federal Communications Commission (Feb. 9, 2008) (AFR).

² Letter from Nicole M. McGinnis, Deputy Bureau Chief, to Michael Ravnitzky (Feb. 6, 2008) (Response).

³ Letter from Michael Ravnitzky to Shoko B. Hair, FOIA Officer (Dec. 25, 2007) (Request).

⁴ Steiner requested copies of complaints regarding TV game shows. CGB disclosed information about 11 complaints derived from CGB's database. See Letter from Nicole M. McGinnis, Deputy Bureau Chief to Emil Steiner (Nov. 16, 2007).

⁵ Request at 1-2.

⁶ Response at 1, citing 5 U.S.C. § 552(b)(5), which applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

⁷ AFR at 1.

should have been released.”⁸ He also claims that “many of the withheld portions were either not deliberative or not predecisional.”⁹ Ravnitzky further suggests that material within the scope of Exemption 5 could be released as a matter of discretion.

3. Exemption 5 encompasses the deliberative process privilege, which is intended to “prevent injury to the quality of agency decisions.”¹⁰ To fall within the scope of the deliberative process privilege encompassed by Exemption 5, records must be both pre-decisional, *i.e.*, “generated before the adoption of an agency policy [*i.e.*, a decision],” and deliberative, *i.e.*, “[reflecting] the give-and-take of the consultative process.”¹¹

4. We have examined the contents of the administrative tracking folder withheld by CGB, which consist of e-mails between CGB staff members containing staff advice and recommendations on how to respond to Steiner’s FOIA request. Because CGB’s response to Steiner’s FOIA request constitutes CGB’s decision, the e-mails preliminary to and prospectively discussing that response are predecisional and deliberative and therefore subject to withholding under FOIA Exemption 5.¹² Contrary to Ravnitzky’s claims, the e-mails contain no factual material that could be meaningfully segregated from deliberative content.¹³ Ravnitzky suggests that the Commission should use its discretionary authority to release the deliberative portions, even though they are covered by Exemption 5.¹⁴ Exemption 5, however, is intended to protect the integrity of agency deliberations,¹⁵ and withholding the material here falls squarely within the purpose of the exemption. Moreover, no countervailing public interest would be served by ignoring the exemption here.

5. Accordingly, it is ordered that the application for review, filed by Michael Ravnitzky IS DENIED. Ravnitzky may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

¹¹ *Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).

¹² See *Michael Ravnitzky*, FCC 08-76 (Mar. 7, 2008) at ¶ 5. Ravnitzky suggests (AFR at 2) that communications from a superior to a subordinate typically do not fall within the deliberative process privilege. We disagree, since the deliberative process privilege protects the “give and take” between subordinates and superiors. See note 11, above. None of the e-mails here, regardless of their direction, are postdecisional, since they are preliminary to formulating CGB’s Response, which constitutes its decision.

¹³ Purely factual material that is segregable from its context is not within the scope of Exemption 5. See *EPA v. Mink*, 410 U.S. 73, 87-88 (1973). Moreover, an agency must disclose any reasonably segregable portion of a record that is not covered by an exemption. See 5 U.S.C. § 552(b). Contrary to Ravnitzky’s suggestion, however, an agency is not required to conduct a line-by-line review of records for segregable material. See *Michael Ravnitzky*, FCC 08-76 at n.17, citing *Doherty v. U.S. Dep’t of Justice*, 775 F.2d 49, 53 (2d Cir. 1985). See also *Michael Ravnitzky*, 16 FCC Rcd 21745, 21748 ¶ 10 (2001).

¹⁴ AFR at 2.

¹⁵ See *Judicial Watch v. Dep’t of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) (“[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to ‘operate in a fishbowl’ because the full and frank exchange of ideas on legal or policy matters would be impossible”), quoting *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997).

6. The officials responsible for this action are the following: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary